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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GIOVANNI PIERRE WHITE et al., Defendants and Appellants.	H025341 (Santa Clara County Super. Ct. No. CC113041)

Defendants Giovanni Pierre White and Unussun Gadsden were convicted, after jury trial, of kidnapping to commit robbery (Pen. Code, § 209, subd. (b)(1)[1] – count 1), second degree robbery (§§ 211-212.5, subd. (c) – count 2), carjacking (§ 215 – count 3), and making criminal threats (§ 422 – count 5). Gadsden was also convicted of fleeing a pursuing peace officer's motor vehicle (Veh. Code, § 2800.1, subd. (a) – count 4.) The jury found various gun use enhancements to be not true. The trial court sentenced both defendants to the indeterminate term of life with the possibility of parole.

On appeal both defendants argue[2] that: (1) the trial court erred or abused its discretion in excluding impeachment evidence, and that trial counsel rendered ineffective

[1] Further unspecified statutory references are to the Penal Code.

[2] Gadsden filed a request for joinder in the relevant arguments raised in White's opening brief.

assistance by failing to base their impeachment requests on constitutional grounds; (2) the trial court erred in failing to instruct the jury that evidence of a codefendant's guilty plea could not be used to prove defendants' guilt, that trial counsel rendered ineffective assistance by failing to request such an instruction, and that admission of the evidence violates the confrontation clause; (3) trial counsel rendered ineffective assistance by failing to make an adequate offer of proof as to the victim's alleged request to buy ecstasy; and (4) cumulative error requires reversal. White separately argues that: (1) the trial court erred in admitting evidence of guns and ammunition that had no connection to the case; (2) the trial court erred in admitting evidence that White had an outstanding arrest warrant; (3) trial counsel rendered ineffective assistance by failing to state meritorious objections to evidence of the guns, arrest warrant, and his mother's out-of-court statements. Gadsden separately argues that there is insufficient evidence to support his conviction of making criminal threats. We will affirm both convictions.

White has also filed a petition for writ of habeas corpus, raising the same ineffective assistance of counsel claims as he has raised on appeal. We previously ordered the petition considered with the appeal. We have disposed of the petition by separate order filed this day. (See Cal. Rules of Court, rule 24(b)(4).)

FACTS

Jesus Solorio was 21 years old at the time of his September 2002 trial testimony, and lived in Hollister. His family owned a white 1995 Toyota Corolla in June 2001. He paid for the installation of three televisions, a PlayStation, a Pioneer stereo, and 12-inch speakers in the car. One television was in the front on the dash, the other two were on the back of the front seats of the car. The PlayStation was kept underneath the front passenger's seat, and could be used with any of the three televisions. The speakers were in the trunk.

The night of June 17, 2001, Solorio drove the car to the Club Tropicana in San Jose with four female friends. He parked in a lot about one block away. They all got out

and walked towards the club. Although the women went inside, he went back to his car because he forgot his wallet. Other people were scattered around the parking lot when he searched his car and found his wallet under a seat. Two men that Solorio identified at trial as defendants White and Gadsden walked towards the car and White said, " 'That's a nice car.' " Solorio stayed by his car and talked to defendants. They asked him about the items he had in the car as he was sitting in the driver's seat making sure that he had secured everything. White opened the front passenger door and sat down inside. Gadsden got in behind him and said that he wanted to play the PlayStation. Solorio allowed Gadsden to play the PlayStation for four or five minutes.

Other people were around another car showing off its hydraulics in the parking lot. A policeman drove into the lot and told everyone to leave, that they could not stay there. White pointed a gun with a long barrel that was tucked in his shirt at Solorio and said, "Drive." Solorio took off and drove defendants at White's direction because he was afraid. During the drive defendants talked about where they should take Solorio and about what they wanted out of the car. White wanted the television and Gadsden wanted the PlayStation.

After about ten minutes they arrived at some apartments on a dead-end street. Solorio stopped the car and defendants started to strip it. White attempted to take the television out of the dash and Gadsden took out the PlayStation. They discussed who was going to keep the stereo parts; White wanted the equalizer and Gadsden wanted the amp and speakers. White told Solorio to take everything out of his pockets, so Solorio got out of the car and gave White his wallet. White opened the wallet and said, " 'If anything happens, I know where you live.' " Gadsden then told Solorio to get down on his knees. Gadsden pointed a gun at Solorio while White struggled to get the television out of the dash. After a minute or two, White told Solorio to get back in the car.

White gave directions to Solorio to drive to an alley and to stop there. It was dark but Solorio could see that they were at an apartment complex. Cars were parked and

there was a dumpster. Solorio asked to be let go, but White hit him with his fist and said, " 'Be quiet.' " White told Solorio to get out of the car and said that if he did anything, " 'I'm going to kill you.' " Solorio did not run because White was still pointing a gun at him. He went around the front of the car and stood by the back passenger side door. The car door was open and Solorio could see Gadsden ripping the equalizer's wiring out while White took the stereo out of the dashboard. White put the removed items, including the speakers from the trunk, in a multicolored blanket in the back seat of Solorio's car, and then put everything in a shopping cart.

White told Gadsden that they should take Solorio somewhere, but Gadsden told him to forget it, that Solorio would not say anything, and to let him go. Gadsden told Solorio to stay there until White returned. White left with the shopping cart, saying that they should put Solorio in the trunk, kill him, and throw him in the river. Gadsden ordered Solorio, at gunpoint, to get into the trunk of the car, so he did. Gadsden attempted to close the trunk lid two or three times, but Solorio stuck a tire iron out to prevent it from closing. When Gadsden opened the trunk lid to see what was going on, Solorio hit him in the stomach with the tire iron. Gadsden went down. Solorio climbed out of the trunk and ran the opposite direction from where White had gone. While he was running, he heard a gunshot behind him. He kept running, jumped a fence at a school, and then jumped another fence. A man he met took him to a police officer.

The officer drove Solorio back to where his car had been, but it was not there. He reported his car, television, stereo, speakers, amp, equalizer, cell phone, wallet, and PlayStation missing. He said that White was wearing an athletic jacket, Gadsden was wearing a bandana, and they both were wearing fishing hats. He suffered bruises from where White hit him.

Detective Anthony Mata was assigned Solorio's case on June 19, 2001. He spoke with Solorio that day at the police department, and did not observe any physical injuries. He made a list of the property that was reported missing and checked Solorio's cell phone

records. He then asked other officers for assistance with a parole search for an individual (not either of the defendants) at a Fallingtree Drive residence in San Jose.

Sergeant Robert St. Amour, Officer Manuel Guerrero, Detective David Gutierrez, and Detective Paul Joseph assisted Detective Mata with the parole search at the Fallingtree Drive residence at 10:45 a.m. on June 22, 2001. While waiting to do the search, Detective Mata heard a radio broadcast that officers conducting surveillance had observed Solorio's car pull up to the residence. Somebody left the residence and entered the car, and the car then drove away. Guerrero saw Solorio's car leave the residence and attempted to initiate a vehicle stop of the car by activating his patrol car's emergency lighting. The car did not pull over, so Officer Guerrero activated his siren. The car still did not pull over, but continued on to an onramp to northbound I-680. There it came to a slow roll and both the driver's door and passenger's door swung open. The two occupants exited the car and ran. Officer Guerrero started chasing them on foot, but they disappeared into a wooded area. Officer Guerrero broadcast the description of the two suspects.

Sergeant St. Amour saw a young male who matched the description of one of the suspects. The man was wearing a blue shirt and a white tee shirt. Sergeant St. Amour directed Sergeant Alex Nguyen to the area where he saw the man run. Sergeant Nguyen found the man inside a nearby house and took him into custody. The man was identified at trial as Byron Finister.

Officer Gutierrez and Detective Joseph saw another young male who matched the description of one of the suspects. The man was not wearing a shirt, was sweating, and appeared out of breath. Officer Gutierrez detained the man, who was identified at trial as Gadsden. Detective Mata searched Gadsden and found Solorio's cell phone in his pants pocket.

Detectives Mata and Joseph returned to the Fallingtree Drive residence to conduct the parole search. Detective Mata found a denim fishing hat in the garage of the

residence. Detective Mata also found a police baton and Solorio's wallet. Detective Joseph found a box containing stereo wire with frayed ends and personal papers and letters. He found a blue backpack in the rafters of the garage that contained stereo wire similar to the other found, as well as a car CD player/radio, equalizer, and faceplate. Detective Joseph also found Solorio's driver's license, some wallet inserts, and pictures in the garage rafters.

Officer Aaron Guglielmelli examined Solorio's car on June 22, 2001. He did not notice any damage, marks, scratches, dents, or chips in the trunk area.

Detective Mata thereafter decided to conduct surveillance at a residence on Vista Glen Avenue in San Jose. Sergeant St. Amour and Detective Joseph searched the Vista Glen residence on June 22, 2001. They found White in the garage of the residence which had been converted into living quarters. White and Nathan Green were arrested there. Michelle Hermosillo, Green's mother, later met with Detective Mata. Hermosillo was aware that White kept property at her home, and told Mata that White's brother Jovarre[3] had come to her home and taken away some property. The property was in a bag, and she had no idea what it was. Mata recovered a gray fishing hat and a black bandanna from the garage.

Detective Mata returned to the Fallingtree Drive address, where he spoke to Jasmine W. and her father. On Monday, June 18, 2001, at about 2:30 a.m., Jasmine was at home with Finister and her boyfriend, Felix Taplin, when Gadsden came into the garage. Mata testified that Jasmine told him that Gadsden placed a multicolored blanket on the ground and that, when he opened it, it contained a PlayStation, CDs, and stereo equipment. She said that Gadsden stated that he had just robbed somebody. She said that White spent the night and left early in the morning. She said that afternoon she saw

[3] We will hereafter refer to White's family members by first name for ease of reference, rather than from out of any disrespect.

Gadsden washing a white car in her driveway. Detective Mata recovered Solorio's multicolored blanket from the garage. Jasmine denied at trial that she owned the multicolored blanket, and denied that she made any of the statements Mata reported she did. She testified that she was aware that Taplin was charged with possession of stolen property as a co-defendant in this case, but she was not aware that he had pleaded guilty.

Detective Mata determined that the incident took place in the general vicinity of the El Rancho Verde apartment complex, and that both defendants lived in the vicinity. He searched the carport area of the complex, but found no weapons or casings, or any other evidence that a weapon had been discharged in the area.

Detective Mata requested that White's jail telephone calls be monitored. On June 23, 2001, Mata received a copy of White's taped phone conversations with his mother, Cheryl.[4] During the first conversation, White told his mother to "go clean my room up," and to tell Jovarre to "sell his speakers." He asked his mother to "go in my room" and "anything you see that is not right then . . . pick it up" "[b]ecause . . . I think mike's . . . there." "[T]hose things that are on the side of the couch too." He said that "they [are] saying that we used a pellet gun," and responded "I don't know" when his mother asked him where the pellet gun was. Cheryl told White that she knew "mike" and that she "[g]ot it," but that she did not see "the other thing." White told her take something "gray" that she had found. She also got "things that you put in" "mike." She told him that she took "long" but not what "long holds." She could not find "an orange box that has little gold things in it." Downstairs, she found "a blue and gray box, [that] has tools in it," and White told her to "[t]ell him to get those . . . things out of there . . . ASAP." During the second conversation, Cheryl told defendant that she found "the

[4] A transcript of the conversations was given to the jury and marked as People's Exhibit 9. Exhibit 9 is included as part of the record on appeal.

orange case" and "[t]hat fake thing," and defendant told her to "get those all out of the house."

After listening to the tape, Detective Mata went to the White household. He knocked on the door, and saw Jovarre go in and out of a window. He was let inside after about 20 minutes. Cheryl came inside the house through the rear door, and Mata met her in the kitchen/living room area. He told her about her taped phone conversations with White. She denied having had the conversations. Mata saw Solorio's speaker box in the living room area, and asked her who owned it. She said that she did not know. She finally admitted to having the phone conversations with White. She said that "long" was also known as "Mike,"[5] and was a rifle that was in her bedroom closet. She said that she knew what "short" meant, and that she did not find it, but that she did find a pellet gun. She said that she had "silver," which was the ammunition to "short." She said that she had put "silver" in her car. Detective Mata recovered the speaker box, a rifle from Cheryl's bedroom, an athletic jacket and two pairs of athletic gloves from White's bedroom, ammunition and a suede gun case from Jovarre's bedroom, and a pellet gun and an orange box of .22 ammunition from Cheryl's vehicle that was parked in the back of the residence. He did not find a handgun that could match the suede gun case.

White testified in his own defense as follows. Prior to his arrest, he had been living in the garage area of Green's home. He had not lived with his mother for about six months. Half of his things were at his mother's, half were at Green's.

On the night of June 17, 2001, White borrowed his friend Fernando's Mazda and went with Green to pick up his friend Samuel. They ran into Gadsden when they were leaving Samuel's place. Gadsden asked if he could go with him. The four of them then went downtown. They parked in a parking lot by Club Tropicana because that is where Fernando was showing off a car he had just bought from Green. A lot of other people

[5] Michael Dillard owned the rifle.

were there. Fernando started playing with the hydraulics on his new car while White and Green talked to some girls.

After about 45 minutes, Fernando's girlfriend called, wanting him home. Fernando told White that he wanted to take the Mazda. Green offered to drive the hydraulic car and got into the car. White went over and told Gadsden that they were leaving. Gadsden was in the front passenger seat of a white car playing with a PlayStation and Solorio was in the driver's seat. Solorio asked, "Do you guys know where to get some ecstasy?" Gadsden said, "Yeah."

A police officer drove up and told everybody to leave. White went back to the Mazda but Gadsden stayed in Solorio's car. After the officer left, White went back to Gadsden. Gadsden said that he was going with Solorio. White decided to go with them, and got in behind Solorio. Gadsden gave Solorio directions to the El Rancho Verde apartments. When they arrived Gadsden was still playing with the PlayStation, and asked White to see if "Jesse" was home.[6] White went to Jesse's apartment and saw that his upstairs bedroom light was off. White threw rocks at Jesse's bedroom window but nobody responded. When he returned to the car Solorio and Gadsden had switched seats, the car's trunk was open, and speakers were in a shopping cart. Gadsden was "messing with something in the front," and White asked him what he was doing. Solorio looked frightened. Gadsden and Solorio got out of the car, and White started arguing with Gadsden. Solorio stood there for a while, until White looked over at him and said, "Man, you're stupid." Solorio then ran.

Gadsden got into the car and drove off, leaving the shopping cart containing the speakers. White heard no gunshots. He started to walk away, but then decided to take the speakers. He took them to his mother's house, which was near by. It was then that he

[6] White testified that he only knew Jesse by his first name and face, but he also knew where he lived.

noticed that his cell phone was missing. He started calling his cell phone number and finally, after "a long, long time," Gadsden answered it. White said, " 'Whatever you do is on you. Just give me my phone.' " Gadsden hung up on him. White wanted his phone, so he called Green and the two of them went looking for Gadsden. When they did not find him, they went back to Green's house. White found Gadsden the next afternoon, and got his cell phone back. He did not call the police because he did not want to be involved; there was also a warrant out for his arrest.

White was arrested at Nathan Green's on June 22. He denied to Detectives Mata and Joseph that he knew anything about what happened on June 17 and 18. He called his mother from the jail and talked to her in code because he knew that the call was monitored. He wanted everything out of the house because he knew the police were going to search it. He did not use a gun on Solorio, but he did not want any weapons found because he did not want the police "to get the wrong impression."

DISCUSSION

Impeachment evidence

The prosecutor moved in limine to exclude, on Evidence Code section 352[7] grounds, evidence that Solorio had an October 2001 misdemeanor conviction for having sexual intercourse with a minor more than three years younger than him (§ 261.5, subd. (c)). The prosecutor argued that the jury was likely to overreact to the conviction resulting in substantial prejudice and that proving the underlying conduct would result in an undue consumption of time. At the hearing on the motion, the prosecutor conceded that the offense was a crime of moral turpitude. The court disagreed that it would involve an undue consumption of time, but felt that the probative value of the evidence was

[7] "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

outweighed by its undue prejudice "given the nature of the conviction to the witness and potential for confusing the issues." The court invited defense counsel to revisit the issue after Solorio testified.

During Solorio's cross-examination, counsel for Gadsden renewed his request to impeach Solorio with the prior misconduct evidence. Counsel argued that, "our defense is basically going to be a drug deal gone bad, . . . And I think that his going to a club with people who are basically underage, something which is consistent with what we hear from the moral turpitude prior, is something that the jury should know about Mr. Solorio." "This is what my concern is: I think under Prop. 115 any specific act of misconduct can come in. Our issue is whether or not Jesus Solorio is a truth teller. The police reports that [the prosecutor] provided us indicate that Mr. Solorio told his girlfriend's mother he would not have sex with her. She subsequently caught him having sex, and he lied. He directly lied to Mom. He was then prosecuted for it and was found guilty. But I think it's clearly a credibility issue here." "I think that it goes further than [it being a misdemeanor conviction involving moral turpitude]. I think that the specific lie he told Mom, he wouldn't have sex with the daughter, and then he does." The court responded, "My ruling remains the same."

Both defendants argue that the trial court's ruling was error and an abuse of discretion. They argue that the court erroneously ruled that the probative value of the evidence was outweighed by its prejudicial effect. They further argue that the ruling violated their constitutional rights to confrontation and to present a defense. Respondent argues that there was no abuse of discretion and that defendants waived any constitutional claims. Defendants counter that trial counsels' failure to raise the constitutional claims amounted to ineffective assistance.

Evidence Code section 351 provides that "all relevant evidence is admissible." Relevant evidence is defined as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

(Evid. Code, § 210.) However, the trial court has "wide discretion" in deciding the relevance of evidence. (*People v. Kelly* (1992) 1 Cal.4th 495, 523; Evid. Code, § 352.) This court will not disturb a trial court's exercise of discretion in admitting or excluding evidence "except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Nonfelony conduct involving moral turpitude is admissible to impeach a witness in a criminal proceeding. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-296 (*Wheeler*); Cal. Const., art. I, § 28, subd. (d).) Whether the conduct is probative of the witness's veracity depends on its nature, not on the fact of a misdemeanor conviction. (*Wheeler, supra,* 4 Cal.4th at pp. 299-300.) The trial court has discretion under Evidence Code section 352 to exclude such evidence when its probative value is substantially outweighed by its potential for prejudice, confusion, or undue consumption of time. (*Id*. at p. 295.)

The trial court in this case consciously exercised its discretion under Evidence Code section 352. The court concluded that although the misdemeanor evidence was admissible for impeachment, it was also highly prejudicial, given the nature of the conviction, and had a potential for confusing the issues. In general, a misdemeanor is a less forceful indicator of immoral character or dishonesty than is a felony. (*Wheeler*, *supra*, 4 Cal.4th at p. 296.) In addition, misdemeanor conduct evidence entails problems of moral turpitude evaluation that felony convictions do not present (*ibid*.) and crimes involving a general readiness to do evil are less indicative of a witness's veracity in testifying than crimes of dishonesty. (*People v. Thornton* (1992) 3 Cal.App.4th 419, 422.) The trial court acted within the bounds of its discretion under Evidence Code section 352 when it found that the relevance of Solorio's misdemeanor conduct was outweighed by its prejudice and potential for confusion. We will not disturb the trial court's ruling.

Nor do we find that trial counsel rendered ineffective assistance by failing to object to the trial court's ruling on the grounds that it violated their constitutional rights to confrontation and to present a defense. A trial court may restrict cross-examination of an adverse witness pursuant to Evidence Code section 352 despite the strictures of the confrontation clause. (*People v. Quartermain* (1997) 16 Cal.4th 600, 623-624 (*Quartermain*).) "[T]he ordinary rules of evidence do not infringe on a defendant's right to present a defense. [Citation.] Trial courts possess the 'traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice.' [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 945 (*Frye*).) A trial court's limitation on cross-examination regarding the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted. (*Frye*, *supra*, 18 Cal.4th at p. 946; *Quartermain*, *supra*, 16 Cal.4th at pp. 623-624.)

In this case, Solorio was repeatedly confronted with contradictions between his trial testimony and prior statements, and his credibility was extensively impeached. Solorio admitted that he had told different stories when he first reported the robbery the night it occurred, when he talked to Detective Mata on June 19, 2001, when he testified at the preliminary hearing, and when he testified at trial. For instance, at the preliminary hearing and at trial, Solorio testified that he was inside his car when defendants came up and asked about the stereo, but in his first statement to police he said that Gadsden pointed a gun at him and ordered him into the car. In his statement to Detective Mata he said that Gadsden asked him for a cigarette, White entered the rear passenger seat of the car and pointed a gun at him, and Gadsden ordered him into the car because "We're going for a ride." At trial Solorio testified that White was in the front seat and did not pull a gun until after the officer entered and left the parking lot. At the preliminary hearing Solorio testified that White had a pocket knife that he used to poke Solorio in the

stomach, but at trial he admitted that he had never mentioned a knife to police. In his statement to police Solorio said that he switched seats with White at a 7-11 store and that White drove to the apartment complex, while at trial Solorio testified that he himself drove to the apartment complex. Even if the trial court erred in failing to allow defendant to be cross-examined regarding his prior misdemeanor conduct, a reasonable jury would not have received a significantly different impression of Solorio's credibility. Thus, there was no confrontation clause violation and counsel cannot be faulted for failing to argue that there was.

Codefendant's plea

The prosecutor moved in limine that the court take judicial notice of Taplin's no contest plea in this case pursuant to Evidence Code section 452, subdivision (d),[8] should Taplin testify. Neither defendant opposed the motion, and the court granted it. Taplin did not testify.[9]

Jasmine testified that Taplin was her boyfriend, and that they were both present in her garage when Gadsden arrived there at 2:30 a.m. on June 18, 2001, but she denied making the statements to Detective Mata that he attributed to her. In an attempt to show her bias, the prosecutor asked Jasmine whether she was aware that Taplin was charged with possession of stolen property as a codefendant in this case. When Jasmine responded in the affirmative, the prosecutor then asked her whether she was aware that Taplin had pleaded guilty to the charges. Jasmine responded that she was not aware of that, and that she had spoken to Detective Mata before Taplin was charged.

During his argument to the jury, the prosecutor discussed Jasmine's testimony and the fact that Jasmine disputed making the statements Detective Mata attributed to her:

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[8] "Judicial notice may be taken of the following matters . . . [¶] (d) Records of (1) any court of this state . . . ." (Evid. Code, § 452.)

[9] The prosecutor told the court that Taplin "subsequently skipped probation and has a bench warrant out."

"What's happened between now – or a couple days ago when Jasmine . . . testified and the time she spoke to the officer? Her boyfriend was arrested for possessing stolen property in this case. He was convicted. She is friends with these defendants. . . . And now she says, 'No. No. What the officer says I . . . told him didn't happen.' [¶] The judge is going to give you an instruction about how you deal with the credibility of witnesses. It doesn't take a jury instruction to know that someone can have a bias which may or may not cause them to be truthful. She's got a whale of a bias. . . . [¶] And this is not just . . . a passing boyfriend. This is a boyfriend she admitted visiting in jail, who was with her, according to what she told Detective Mata, when defendant Gadsden came in with this property."

Defendants now argue that the trial court should have instructed the jury that evidence of Taplin's guilty plea could not be considered as evidence of defendants' guilt. That is, they argue that the trial court had a sua sponte duty to instruct the jury that the evidence of Taplin's plea was admitted for a limited purpose and could not be considered for any other purpose. In a related argument, defendants claim that trial counsel rendered ineffective assistance by failing to request an instruction regarding the limited use of the evidence.[10]

" 'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' [Citation.]" (*People v. Sedeno* (1974)

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[10] The trial court did give CALJIC No. 2.09, but there was no instruction stating that it applied to the evidence of Taplin's plea. The court instructed: "Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purposed for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted."

10 Cal.3d 703, 715, overruled on another ground in *People v. Breverman* (1998) 19 Cal.4th 142, 163, fn. 10.) "However, the trial court had no sua sponte duty to . . . instruct the jury on specific evidentiary limitations." (*People v. Montiel* (1993) 5 Cal.4th 877, 918.) Thus, counsels' failure to request a limiting instructing as to the evidence of Taplin's plea waived defendants' direct claims of error.

We also find no incompetence of counsel warranting reversal. A conviction will not be reversed on appeal based on a claim of ineffective assistance of counsel unless a defendant establishes both (1) that counsel's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to the defendant would have resulted. If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails. (*People v. Padilla* (1995) 11 Cal.4th 891, 935-936 (*Padilla*), overruled on another ground in *People v. Hill* (1999) 17 Cal.4th 800, 823, fn. 1.)

We will assume for the sake of discussion that defense counsel should have requested a limiting instruction after Jasmine's testimony. However, we conclude that defendants were not prejudiced by the absence of such an instruction. The prosecutor presented the evidence of Taplin's guilty plea for the limited purpose of showing Jasmine's bias. The prosecutor's argument about the evidence limited the relevance of the evidence. The facts of the case, including the fact that the stolen property was recovered from Gadsden and White, overshadows the potential prejudice of the plea evidence. The court gave CALJIC No. 2.09, although it did not instruct that it applied to evidence of Taplin's plea. The possibility that such an instruction, had it been requested and given, would have led to a result more favorable to defendants is not reasonably probable " 'since the likelihood of the jury's using the evidence for an improper purpose was so minimal under the facts of this case that any conceivable error was harmless.'" (*Padilla*, *supra*, 11 Cal.4th at p. 951.)

Both defendants also argue that the trial court's admission of evidence of Taplin's plea violated the confrontation clause. They argue that evidence of a codefendant's guilty plea constitutes "the functional equivalent of prior testimony and confessions," and thus was inadmissible because there was no opportunity for them to cross-examine Taplin at the time Taplin entered his plea. (See *Crawford v. Washington* (Mar. 8, 2004, No. 02-9410, ___ U.S. ___ [2004 C.D.O.S. 2017, 2022] (*Crawford*).) Here, evidence of Taplin's guilty plea was presented for the limited purpose of showing Jasmine's bias, and not as evidence of defendants' guilt. Thus, admission of evidence of Taplin's plea did not violate defendants' right to be "confronted with the witnesses against [them]." (U.S. Const., 6th Amend.)

Solorio's request to buy ecstasy

White testified that Solorio asked, "Do you guys know where to get some ecstasy." The prosecutor had objected to admission of this testimony, but the trial court overruled the objection when White's counsel stated that the testimony was not offered for its truth but only to show White's state of mind. During his argument to the jury, the prosecutor reminded the jury that the court had ruled that the testimony was not admitted for its truth but only to show White's state of mind. The prosecutor argued that the evidence was admitted to show why White did what he did, but that the jury was not allowed to consider it proved that the statement was made or its effect on Gadsden. " 'You are not to consider this evidence for any purpose except the limited purpose for which it was admitted.' " (See CALJIC No. 2.09.)

Gadsden's counsel argued to the jury that White's testimony about Solorio's request to buy ecstasy showed that Solorio's driving was consensual, which "takes away any of the fear stuff. It takes away any of the . . . elements of kidnapping. It takes away the elements of the robbery. It takes that stuff away." White's counsel argued to the jury that White's version of the events of June 18, 2001, was very believable and that Solorio

had a number of reasons to lie, including that he "doesn't want the police to know that he's involved in drugs."

Defendants argue on appeal that their counsel rendered ineffective assistance by failing to offer the evidence of Solorio's request to buy ecstasy as circumstantial evidence of Solorio's intent and conduct in conformity with that intent: "the request tended to prove that Solorio went willingly with [defendants] and was not kidnapped. If admitted for this purpose, evidence of Solorio's inquiry would have supported the defense theory that he lied about the charged offense to avoid getting in trouble for trying to buy ecstasy to take with underage girls." We find no incompetence of counsel.

The jury was allowed to consider White's testimony about Solorio's request to buy ecstasy for the effect it had on White. That is, the jury could have properly considered the statement as evidence that White believed that Solorio was driving the car with defendants willingly. Accordingly, the jury could have found that there was no kidnapping because Solorio was not moved against his will, as Gadsden's counsel argued to the jury. The jury necessarily rejected counsel's argument when it found both defendants guilty of kidnapping. Neither defendant was prejudiced by their counsel's failure to request that the testimony be admitted as circumstantial evidence that Solorio went with defendants willingly and was not kidnapped.

Evidence of guns and ammunition

White moved in limine to exclude all evidence of guns and ammunition not connected to the case, specifically the pellet gun, under Evidence Code section 352. Counsel told the court that Finister had said that he had seen White with a gun, that Hermosillo overheard another witness ask officers if a black gun was taken, that a pellet gun was found, and that Jovarre had said that there was a missing gun in the house which was chrome in color but the guns allegedly used in the case were black. Counsel argued that, "with regard to each mention of guns or pellet guns, there is significant issues of reliability and relevance. So I would object to any mention of [White's] possession of

guns or pellet guns. I don't think it's sufficiently reliable." The prosecutor argued that he did not intend to introduce any evidence of pellet guns, but he believed that "there is a missing gun which matches the description of a weapon that was used in the crime that witnesses will say belongs to [White.]" White's counsel requested that, prior to offering any testimony about White having been seen with a gun, the court hold an Evidence Code section 402 hearing "as to when the gun was seen, what the gun was like, etc., to make a final determination as to whether it's relevant."

The court first denied the request for an Evidence Code section 402 hearing, then addressed the Evidence Code section 352 issue. "There may be other evidence admissibility issues which deal with testimony about the guns, hearsay, for example, which can be addressed during the course of trial. [¶] But with reference to the Evidence Code section 352 objection, I find that the evidence proposed by the People is highly probative, and I find the probative value of the evidence outweighs any possibility of undue or unfair prejudice. Therefore, that objection is overruled."

At trial, evidence was presented that, as a result of White's telephone call to his mother, she found a rifle, a pellet gun, and a box of ammunition. Detective Mata seized a pellet gun, a rifle, a gun case that contained two bullets but no gun, and a box of .22 ammunition. The prosecutor argued to the jury that the testimony showed that two guns were involved in the crimes against Solorio, one of which had a long barrel, that White wanted his mother to find and hide firearms, that "short" was code for a firearm that she could not find, and that a gun case with no matching gun but with ammunition was found.

White argues that the trial court prejudicially erred in admitting the evidence of guns and ammunition that it did here. We disagree.

"When the specific type of weapon used to commit a [crime] is not known, it may be permissible to admit into evidence weapons found in the defendant's possession some time after the crime that could have been the weapons employed. There need be no

conclusive demonstration that the weapon in defendant's possession was the [crime] weapon. [Citations.] When the prosecution relies, however, on a specific type of weapon, it is error to admit evidence that other weapons were found in his possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons." (*People v. Riser* (1956) 47 Cal.2d 566, 577 (disapproved on other grounds by *People v. Chapman* (1959) 52 Cal.2d 95, 98, and *People v. Morse* (1964) 60 Cal.2d 631, 637-638, fn. 2, 648-649).)

Here, since the prosecution did not rely on the defendants threatening Solorio with a particular gun, the rule of *Riser* does not preclude evidence that guns and ammunition were found in White's mother's residence and car after he had asked her to find and hide them. The prosecutor did not assert that White's gun possession by itself made White a criminal.

White relies on *People v. Henderson* (1976) 58 Cal.App.3d 349, and *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378. Both cases found prejudicial error in admitting evidence that the defendant possessed a weapon which was obviously not the one used in the charged offense. That is not the case here. There was evidence that White pointed a gun with a long barrel at Solorio, and that Gadsden also had a gun. White told his mother to look for and hide firearms she referred to as "long" and "short." "Long" turned out to be a rifle, and a rifle, a pellet gun, a gun case that contained ammunition but no gun, and a box of ammunition were found in the White residence. Solorio's speaker box was also found there. The court did not err in admitting the gun and ammunition evidence it did.

Even if we were to assume that the trial court erred in admitting the gun and ammunition evidence, we would find the error harmless. The jury found all gun use enhancements to be not true as to both Gadsden and White. There was overwhelming evidence that both defendants otherwise committed the charged offenses. It is not reasonably probable that a result more favorable to White would have occurred had the

gun and ammunition evidence not been admitted. (*People* v. *Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

Outstanding arrest warrant

During his direct examination, White testified that he did not call the police to tell them what happened the night of the incident because, "I didn't want to have any involvement with the police or anything that happened." Prior to cross-examining White, the prosecutor requested permission to impeach White with the fact that he had an outstanding arrest warrant. "When asked why he didn't call the police, he said he didn't want to get involved with them. And that's not the whole truth. I'm quite convinced the reason he didn't want to call the police is that he had a warrant out for his arrest. It's not quite as innocent as he's made it out to be." Defense counsel objected on the grounds of relevancy, but the court overruled the objection.

The following occurred during White's cross-examination.

"[PROSECUTOR]: [Defense counsel] asked you several times if you called the police.

"[WHITE]: Right.

"[PROSECUTOR]: Do you remember that? [¶] And you did not call the police at any point; is that correct?

"[WHITE]: No.

"[PROSECUTOR]: You told [defense counsel] that you didn't want to be bothered or involved with the police; is that correct?

"[WHITE]: Right.

"[PROSECUTOR]: Isn't it true that the reason you didn't call them is because you had a warrant out for your arrest?

"[DEFENSE COUNSEL]: Objection. Argumentative.

"THE COURT: Overruled.

"[WHITE]: Yes.

"[PROSECUTOR]: So when you told us earlier today you didn't want to get involved with the police, in fact, you didn't want the police to arrest you.

"[WHITE]: But I wasn't worried about that. That's minor. It was minor.

"[PROSECUTOR]: What was minor to you about having a warrant out for your arrest?

"[WHITE]: I mean, it was a warrant, but it wasn't like, oh, like so serious that – I mean, I was two months, a month. It wasn't nothing that I was really too much worried about being brought in for."

The prosecutor argued to the jury that White said he did not call the police because he did not want to get involved with them and that the prosecutor had had to ask White about the outstanding arrest warrant. "You're an 18-year-old kid with a warrant out for your arrest, you claim it doesn't matter to you. But are you not calling the police because you don't want to get involved with them in an investigation of your buddy or because you don't want to go to jail yourself?"

White argues here that evidence of his outstanding arrest warrant on an unrelated case should have been excluded as irrelevant and unduly prejudicial character evidence.

We find that any error in admitting the evidence did not result in a miscarriage of justice. While the evidence may have been prejudicial in the broad sense of the word, it was also relevant to show that White did not give an accurate account of why he did not contact the police. "Evidence tending to contradict any part of a witness's testimony is relevant for purposes of impeachment. [Citations.]" (*People v. Lang* (1989) 49 Cal.3d 991, 1017.) As both prejudicial and probative, the evidence was admissible in the discretion of the trial court. (Evid. Code, § 352; *People v. Lankford* (1989) 210 Cal.App.3d 227, 240-241.) White was allowed to explain that he did not think that the arrest warrant was for a serious matter, and no evidence was presented to contradict this testimony. There was no mention of what the arrest warrant was for, or that White had been in juvenile hall. As we stated previously, the evidence that White committed

the charged offenses was overwhelming. It is not reasonably probable that a result more favorable to White would have occurred if the outstanding arrest warrant evidence had not been admitted. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

Ineffective assistance of counsel

White separately argues that his trial counsel rendered ineffective assistance by failing to state meritorious objections to the evidence of the guns and ammunition and arrest warrant. As we have previously stated that any error in admitting this evidence was not prejudicial, White's claim of ineffective assistance regarding the evidence must fail. (*Padilla*, *supra*, 11 Cal.4th at pp. 935-936.)

White also argues that his trial counsel rendered ineffective assistance by failing to state a meritorious objection to admission of his mother's out-of-court statements to Detective Mata regarding her phone conversation with White. White's counsel brought a hearsay objection when the prosecutor first questioned Detective Mata about his conversation with Cheryl regarding her telephone conversations with White. The prosecutor argued that Cheryl's responses were a statement against interest because she was attempting to hide weapons which were potential evidence in the case. Cheryl was charged as an accessory and was awaiting trial. White's counsel objected that Cheryl had been subpoenaed as a witness and had not invoked her Fifth Amendment rights, and that there was no mention of a rifle being involved in the case. "So the fact that she may have been concealing weapons in her car is totally irrelevant to the charges." The court sustained the objection.

The next morning, Cheryl appeared with counsel, outside the presence of the jury, and invoked her Fifth Amendment right not to testify. Later that day, the prosecutor recalled Detective Mata. Defense counsel stated that she had no objection to his testimony, as long as it was limited to Cheryl's statements. Detective Mata then testified regarding Cheryl's statement explaining her phone conversations with White and the meaning of "long," "Mike," and "short." White now argues that Detective Mata's

testimony regarding Cheryl's statements was inadmissible hearsay, and counsel should have objected that Cheryl's statements were not sufficiently trustworthy to satisfy either Evidence Code section 1230 or the confrontation clause.

As we stated above, to prevail on a claim of ineffective assistance of counsel, a defendant must establish not only representation below an objective standard of reasonableness, but also resultant prejudice. (*Padilla*, *supra*, 11 Cal.4th at pp. 935-936.) " 'Tactical errors are generally not deemed reversible; and counsel's decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . ." [Citation.]' " (*People v. Hart* (1999) 20 Cal.4th 546, 623-624.)

The record on appeal fails to disclose why counsel failed to object to Mata's testimony on Evidence Code section 1230 or confrontation clause grounds, but we believe that there is a satisfactory explanation for it. Evidence Code section 1230 provides in relevant part, "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him [or her] to the risk of civil or criminal liability, . . . that a reasonable man [or woman] in his [or her] position would not have made the statement unless he [or she] believe it to be true." "The proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character." (*People v. Duarte* (2000) 24 Cal.4th 603, 610-611.) "We review a trial court's decision as to whether a statement is against a [declarant's] penal interest for abuse of discretion."

(*People v. Lawley* (2002) 27 Cal.4th 102, 153; *People v. Gordon* (1990) 50 Cal.3d 1223, 1252.)

The prosecutor showed that Cheryl was unavailable, that her statements were against her penal interest when made, and that the statements were sufficiently reliable to warrant admission. Cheryl had invoked her Fifth Amendment right not to testify. She knew at the time that she made the statements, based on her telephone conversations with White as well as Detective Mata's statements to her, that White was charged with robbery and that firearms were involved. The statements she made were sufficiently reliable, as the items she discussed were found by Detective Mata where she said they would be. It is not reasonably probable that had counsel raised an Evidence Code section 1230 objection, the objection would have been sustained.

At the time of trial, it was settled that admission of a hearsay statement possessing sufficient indicia of reliability to fall within the hearsay exception of a declaration against penal interest did not deny a defendant the right of confrontation guaranteed by the United States Constitution. (*Ohio v. Roberts* (1980) 448 U.S. 56, 66 (*Roberts*); *People v. Greenberger* (1997) 58 Cal.App.4th 298, 330-331.) Thus, at the time of trial, a confrontation clause objection by counsel would likewise have been unavailing. The United States Supreme Court has recently overruled *Roberts* and held that, unless the defendant had an opportunity to cross-examine the declarant when the statement against penal interest was made, admission of the statement does violate the confrontation clause. (*Crawford, supra,* at p. 2017.) As White did not have an opportunity to cross-examine Cheryl at the time her statements to Detective Mata were made, *Crawford* now precludes the admission of Cheryl's statements. However, counsel cannot be faulted for failing, at the time of trial, to anticipate that the United States Supreme Court would overrule *Roberts* and 24 years of precedent following it.

In addition, defendant cannot show that he was prejudiced by the admission of Cheryl's statements to Detective Mata. Even without the statements, there was

overwhelming evidence of White's guilt. Solorio identified White and Gadsden as the men involved in his armed kidnapping and robbery, and White admitted his presence and his possession of the speakers stolen from Solorio. The speakers were found at Cheryl's house, along with White's athletic jacket and some weapons. Gadsden had Solorio's cell phone on him when he was found running from Solorio's car, and other property belonging to Solorio was found at an address Gadsden had been to just after the kidnapping and robbery. As other properly admitted evidence amply supports White's conviction, any error in admitting the evidence was harmless beyond a reasonable doubt. (*Chapman* v. *California* (1967) 386 U.S. 18, 24.)

Cumulative error

Both defendants contend that the cumulative effect of all their alleged errors requires reversal. We disagree. In assessing cumulative error, the critical question is "whether defendant received due process and a fair trial." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349; see also *People v. Cain* (1995) 10 Cal.4th 1, 82 [a defendant is entitled to a fair trial, not a perfect one].) As discussed above, any evidentiary errors were harmless. As we believe that there was no error that would have affected either defendant's due process and fair trial rights, whether viewed individually or collectively, there was no cumulative error.

Sufficiency of the evidence

Gadsden contends that insufficient evidence supports his conviction of having made threats to Solorio to commit a crime resulting in death or great bodily injury. He argues, "Quite simply, Gadsden made no such statements to Solorio. Accordingly, the judgment against Gadsden for violating section 422 should be reversed." Respondent argues that the evidence is sufficient to support Gadsden's conviction as an aider and abettor.

In reviewing a case for sufficiency of the evidence, we determine "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt."

(*Jackson v. Virginia* (1979) 443 U.S. 307, 318.) We examine the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) " 'It is blackletter law that any conflict or contradiction in the evidence, or any inconsistency in the testimony of witnesses must be resolved by the trier of fact who is the sole judge of the credibility of the witnesses. It is settled in California that one witness, if believed by the jury, is sufficient to sustain a verdict.'" (*People v. Watts* (1999) 76 Cal.App.4th 1250, 1258-1259; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 608-609.)

In considering the sufficiency of the evidence to support a conviction based upon aider and abettor liability, we recognize that "[a]ll persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed" (§ 31), and that an aider and abettor "shares the guilt of the actual perpetrator." (*People v. Prettyman* (1996) 14 Cal.4th 248, 259.)

The mental state necessary for conviction as an aider and abettor, however, is different from the mental state necessary for conviction as the actual perpetrator. "The actual perpetrator must have whatever mental state is required for each crime charged . . . . An aider and abettor, on the other hand, must 'act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.] The jury must find 'the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense . . . .' [Citations.]" (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123.) A finding of aiding and abetting will not be set aside unless the record clearly demonstrates there is insufficient substantial evidence to support it on any hypothesis. (*People v. Moore* (1953) 120 Cal.App.2d 303, 306; *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094.) In order to hold White liable as an aider and abettor, it must

be determined whether he, "in any way, directly or indirectly, aided the perpetrator, with knowledge of the latter's wrongful purpose." (*In re Lynette G.*, *supra*, 54 Cal.App.3d at p. 1094.)

Section 422 provides, in pertinent part, that "[a]ny person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

Solorio testified that at their first stop White told Solorio to take everything out of his pockets, so Solorio got out of the car and gave White his wallet. White opened the wallet and said, "If anything happens, I know where you live." Gadsden then told him to get down on his knees, pointing at gun at him. Later, at the apartments, Gadsden told Solorio to stay put until White returned. White left with the shopping cart, saying that they should put Solorio in the trunk of the car, kill him, and throw him in the river. Gadsden then, at gunpoint, ordered Solorio into the trunk of the car. Solorio testified that each time he was threatened he was afraid. The court instructed the jury on the definition of principals as well as on aiding and abetting liability. (CALJIC Nos. 3.00, 3.01.)

All requisite elements for a finding of aiding and abetting the charged criminal threats are present in this case. Gadsden impliedly acknowledges there was sufficient evidence to find that White violated section 422. The jury had ample reason to conclude that Gadsden aided and abetted White as he threatened Solorio. Accordingly, we

conclude that there was substantial evidence to support Gadsden's conviction of violating section 422.

DISPOSITION

The judgments are affirmed.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

WUNDERLICH, J.

MIHARA, J.